
Respondent.

DECISION AND ORDER

United States Postal Service on August 9, 2002. The Postal Service attempted to deliver the envelope containing Respondent's Notice of Appeal to the County Superintendent on August 12, 2002, but was unable to do so because the County Superintendent's office was closed during the noon hour. The County Superintendent received the Notice of Appeal from the Postal Service on August 13, 2002. The County Superintendent accepted jurisdiction by a Statement of Jurisdiction dated August 16, 2002. The District filed a Motion to Dismiss Respondent's appeal for lack of jurisdiction on August 21, 2002, which motion was denied by the County Superintendent on August 28, 2002. The District filed an Amended Notice of Immediate Appeal with the Superintendent of Public Instruction (the State Superintendent) on September 3, 2003.

The County Superintendent's Order Denying the District's Motion to Dismiss is the subject of this appeal and the question before the State Superintendent is: Did the County Superintendent err as a matter of law in denying the District's Motion to Dismiss?

STANDARD OF REVIEW

The State Superintendent's review of a county superintendent's decision is based on the standard of review of administrative decisions established by the Montana Legislature in Mont. Code Ann. §2-4-704 and adopted by the State Superintendent in Admin. R. Mont. 10.6.125. Conclusions of law are reviewed to determine if the correct standard of law was applied. See, for example, Harris v. Trustees, Cascade County School Districts No. 6 and F, and Nancy Keenan, 241 Mont. 274, 277, 786 P.2d 1164, 1166 (1990) and Steer, Inc. v. Dept. of Revenue, 245 Mont. 470, at 474, 803 P.2d 601, 603 (1990).

The State Superintendent may reverse or modify the County Superintendent's decision if substantial rights of the District have been prejudiced because the conclusions of law and order are (a) in violation of constitutional or statutory provisions; (b) in excess of the statutory authority; (c) made upon unlawful procedure; (d) affected by other error of law; (e) clearly erroneous in view of the reliable, probative and substantial evidence on the whole record; (f) arbitrary or capricious or characterized by abuse of discretion or clearly unwarranted exercise of discretion; or (g) affected because findings of fact upon issues essential to the decision were not made although requested. Admin. R. Mont. 10.6.125(4).

The County Superintendent's denial of the District's Motion to Dismiss based on lack of jurisdiction is a conclusion of law. Conclusions of law shall be reviewed to determine if the

agency's interpretation of the law is correct. Steer, Inc. v. Dept. of Revenue, 245 Mont. 470, 474, 803 P.2d 601, 603 (1990).

MEMORANDUM OPINION

Issue: Did the County Superintendent err as a matter of law in denying the District's motion to dismiss the Respondent's appeal?

Yes. The County Superintendent lacks the jurisdiction to consider an appeal that is not timely filed.

The County Superintendent's authority to consider matters of controversy is specifically derived from Montana statutory and administrative law. "Except for disputes arising under the terms of a collective bargaining agreement or as provided under 20-3-211 or 20-4-208, the county superintendent shall hear and decide all matters of controversy arising in the county as a result of decisions of the trustees of a district in the county." Mont. Code Ann. §20-3-210(1). "A school controversy contested case shall be commenced *by filing a notice of appeal with the county superintendent* and the parties within 30 days after the final decision of the governing authority of the school district is made." Admin. R. Mont. 10.6.103(2) (emphasis added).

Therefore, before a county superintendent may consider a controversy, a notice of appeal must be properly filed with the county superintendent. If such notice is not properly filed, the county superintendent lacks jurisdiction to consider the appeal. "A county superintendent lacks jurisdiction if the appeal is not timely, if the issue raised is not actionable, or if the county superintendent does not have subject matter jurisdiction to hear the matter." Swecker v. School District No. 3, Blue Creek Elementary District, OSPI 278-99 (2001).

The issue at the center of this appeal is the timing of the filing of Respondent's Notice of Appeal. Rule 10.6.103(2) provides that Respondent's Notice of Appeal must be filed within 30 days after the District's Board of Trustees' decision to terminate Respondent's employment, which occurred at a meeting held on July 12, 2002. Thirty days from July 12, 2002 (not counting July 12) was Sunday, August 11, 2002. Since August 11 was not a business day, Respondent had until the close of business on Monday, August 12, 2002, to file a Notice of Appeal. He failed to do so. The County Superintendent did not receive the Notice of Appeal until the next day, August 13.

That filing deadline is critical and if it is not met, the County Superintendent lacks jurisdiction to consider the appeal. "After the time allowed for appealing a school board's

decision has passed, neither a County Superintendent, this Superintendent, nor a Court has the jurisdiction to set aside the board's act." Fuhrman v. Board of Trustees, Garfield County School District No. 1, OSPI 224-93 (1994). By their very nature, statutes of limitation, like the one contained in Rule 10.6.103(2) are substantive, not procedural.

Respondent failed to meet the filing deadline. Although the Postal Service attempted to deliver his Notice of Appeal on the deadline, the County Superintendent did not receive the Notice until August 13, one day beyond the filing deadline. In other words, the Notice was filed on August 13, not on August 12.

Respondent attempts to argue that filing in this matter "was accomplished by properly submitting the Notice of Appeal to the United States Post Office, postage prepaid, and sent certified mail and addressed to [the] Fergus County Superintendent of Schools." In addition, Respondent argues that the notice was also "filed" with the District by certified mail. This argument appears to either misuse or misunderstand the words "file" and "serve" in this legal context.

The governing rule in this matter provides: "A school controversy contested case shall be commenced by **filing** a notice of appeal with the county superintendent and the parties within 30 days after the final decision of the governing authority of the school district is made. Notice of appeal shall be **served** by certified mail. Respondent shall **file** a written reply to the notice of appeal within 10 days of receipt." Admin. R. Mont. 10.6.103(2). The Rule employs two distinct concepts -- filing and serving. Both concepts are commonplace in legal proceedings.

According to Black's Law Dictionary, 5th Ed., p. 566, a "paper is said to be filed when it is delivered to the proper officer, and by him received to be kept on file as a matter of record and reference." In this case, the proper officer to whom one files a notice of appeal is a county superintendent. Therefore, to "file" a document with the other parties, who are not officials in the matter, makes no sense. However, "service" of the document on the other parties makes perfect sense. "The service of writs, summonses, etc., signifies the delivering to or leaving them with the party to whom or with whom they ought to be delivered or left; and, when they are so delivered, they are said to have been served." Black's Law Dictionary, 5th Ed., p. 1227.

The key function of Rule 10.6.103(2) is substantive; it outlines the steps that must be taken to vest a county superintendent with proper authority or jurisdiction to consider a controversy. If a notice of appeal is not delivered to the county superintendent (i.e., filed) within

30 days, as required by Rule 10.6.103(2), the county superintendent lacks jurisdiction to consider the matter. The other delivery requirements of Rule 10.6.103(2) are procedural; they outline to whom and by what means the notice must be delivered (i.e., served).

Respondent correctly asserts that this matter is not specifically or exclusively governed by the Montana Rules of Civil Procedure. See Yellowstone County School District No. 7-70, Laurel v. Michunovich, OSPI 285-01 (2001) ("Granted, there are instances in which county superintendents and the State Superintendent have looked to and relied on the Rules of Civil Procedure and the Supreme Court cases interpreting the same. However, in those instances, the superintendents were not required to follow the Rules of Civil Procedure.") However, one need not look just to the Rules of Civil Procedure for affirmation of the above-referenced definition of "filing." "To file papers is to deposit them with the proper custodian for keeping." Espelin v. City of Great Falls, 160 Mont. 135, 140, 500 P.2d 1194, 1196 (1972) (quoting In re Dewar's Estate, 10 Mont. 426, 25 P. 1026 and referencing 45 Am.Jur. Records and Recording Laws, s 6 and Black's Law Dictionary, 4th Ed.) (involving a controversy involving the filing of a petition with a city clerk). The distinction between filing and service was also made clear by the Montana Supreme Court in Schaffer v. Champion Home Builders Company, 229 Mont. 533, 536, 747 P.2d 872, 874 (1987): "Unlike service by mail, which is complete on the date of mailing, filing by mail is not complete until the pleading is placed in the custody of the clerk of court." In this case, filing is not complete until the Notice is placed in the custody of the County Superintendent, which was not done until the day after the filing deadline.

To assist county superintendents with this issue, the State Superintendent offers the following guidance: The filing of papers with a county superintendent or with the State Superintendent as required by Mont. Code Ann. §§20-3-207 and 20-3-210 and by Admin. R. Mont. 10.6.101, et seq. shall be made by filing them (i.e., delivering them) with either the county superintendent or the State Superintendent, as the appropriate case might be. Papers may be filed by facsimile, provided the original document must be filed with the appropriate officer within five business days of the receipt of the facsimile copy or the filing will be treated as void.

It is worth noting that the County Superintendent was not negligent in her duties in this case. The County Superintendent was apologetic for closing her office during the noon hour and for missing the attempted delivery of the Notice. She need not be. Montana law does not prescribe specific office hours for a county superintendent and her office was not required by

state law to be open during the noon hour. The specific requirement that the county superintendent's office be open "from 8 a.m. until 5 p.m." was eliminated by the legislature in 1995 and replaced with a provision that the "office hours be determined by the governing body." Mont. Code Ann. §20-3-204. It is not uncommon for places of business, including government offices, to be closed during the noon hour. It was not unreasonable that the County Superintendent closed her office during that noon hour, and she did nothing unprofessional or inappropriate in doing so. The burden was on the Respondent to file successfully his Notice of Appeal.

Although Respondent mailed his Notice of Appeal on August 9, 2002, the County Superintendent did not receive the Notice until August 13, 2002, one day past the filing deadline. Therefore, the appeal was not timely filed and the County Superintendent lacks the requisite jurisdiction to hear the appeal.

CONCLUSION

The County Superintendent's August 28, 2002, Order denying the District's motion to dismiss for lack of jurisdiction in this matter is hereby REVERSED. The District's motion to dismiss is hereby GRANTED.

Dated this 25th day of April 2003.

/s/ Linda McCulloch
LINDA McCULLOCH
Superintendent of Public Instruction

CERTIFICATE OF SERVICE

THIS IS TO CERTIFY that on this 28th day of April 2003, I caused a true and exact copy of the foregoing "DECISION AND ORDER" to be mailed, postage prepaid, to the following:

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